APPENDIX A

The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. § 751 *et seq.*, provides in pertinent part:

> Section 757(b). The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.
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> • • • • •
>
> Section 777. If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:
>
> (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount

of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

The Federal Tort Claims Act, 60 Stat. 842, as amended, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, provides in pertinent part:

Section 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2676. The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,004

WIEN ALASKA AIRLINES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

[April 6, 1967]

On Appeal from the United States District Court
for the District of Alaska

Before: JERTBERG and MERRILL, Circuit Judges, and MATHES, District Judge.

JERTBERG, Circuit Judge:

The issue of law involved in this appeal is whether Section 7(b) of the Federal Employees' Compensation Act [5 U.S.C. § 757(b)],[1] bars a third-party claim for non-contractual indemnity in an action where plaintiff is an F.E.C.A. beneficiary.

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[1] Sec. 7(b) of the Federal Employees' Compensation Act [5 U.S.C. § 757(b)]:

> "The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however*, That this subsection shall not apply to a master or a member of the crew of any vessel."

The facts are not in dispute. One Backlund, an employee of the Federal Aviation Agency, while in performance of his duties, was killed when an aircraft owned and operated by appellant and in which Backlund was a passenger, crashed. Backlund's widow, suing as administratrix of his estate on behalf of herself and the surviving children, brought a wrongful death action in the state court in the State of Alaska, alleging Backlund's death was due to appellant's negligent operation, maintenance and control of the aircraft.

Appellant impleaded the Federal Aviation Agency employee, one Narcisso, who had been on duty on the day of the crash. The third party complaint alleged that the crash had been caused by Narcisso's negligent performance of his duties as an Air Traffic Control Specialist, and sought full idemnity in the event Wien was held liable to the administratrix of Backlund's estate. Appellant asked for full indemnity from Narcisso in the event it was held liable to the estate.

The cause was removed to the United States District Court for the District of Alaska. Appellant amended its third-party complaint in Federal Court to add Narcisso's employer, the United States, as a third-party defendant.

The United States filed a motion for summary judgment and attached to it certain exhibits which showed that Backlund had been an employee of the Federal Aviation Agency at the time of his death and that the Federal Bureau of Employees' Compensation had ruled that he was in the performance of his duties when killed, and that an award had been entered under which Mrs. Backlund was receiving monthly payments of $525.00 for herself and her children.

On the basis of these facts, which were not disputed by appellant, the Government contended that since Sec. 7(b) of the Federal Employees' Compensation Act barred any

tort claim by Backlund's widow against the United States, the United States could not be liable to appellant for all or part of the administratrix' claim against appellant.

On hearing of the motion for summary judgment, the District Court granted the motion and dismissed with prejudice the amended third-party complaint filed by appellant. In so doing the District Court relied upon the holding of this Court in *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (9th Cir. 1964).

In *Wiener*, which appellant does not seek to distinguish from the case before us, we held, in substance, that a claim for non-contractual tort indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured. See *Wiener, supra*, pp. 403-404.

In the instant case, under the provisions of Sec. 7(b) the United States is not liable in tort to the legal representatives, spouse, dependents, or next-of-kin of Backlund for damages on account of his death.

The judgment appealed from is affirmed on the authority of *Wiener, supra.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,004

WIEN ALASKA AIRLINES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL from the United States District Court for the District of Alaska.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 6, 1967

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of May 18, 1967

Before: JERTBERG and MERRILL, Circuit Judges and MATHES, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court; IT IS ORDERED that the petition of appellant filed May 5, 1967 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.